

Connections

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## **BC Court of Appeal Finds Consultant Liable For Flawed Tender Process**

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On Wednesday, May 17, 2006, the British Columbia Court of Appeal handed down its Reasons for Judgement in *Stanco Projects Ltd. v. Her Majesty the Queen and Aplin & Martin Consultants Ltd.* 2006 BCCA 246. The case arose out of a peculiar set of facts and allowed the Court to comment on the practice of bid shopping and its effect on the tendering process. The case also allowed the Court to consider a consultant's potential liability to its client when the consultant is engaged to coordinate a tender process. Accordingly, the trial and appellate decisions collectively provide guidance in respect of the practice of bid shopping, and in respect of a consultant's liability for its role in the tender process. These principles are summarized below.

### **A. BID SHOPPING**

At trial, Madam Justice Ballance of the British Columbia Supreme Court concluded that, as part of an implied term of every tender contract to treat all bidders fairly, unless the tender documents indicated otherwise, an owner could not engage in bid shopping. Madam Justice Ballance held that the practice of bid shopping should be given the following expansive definition:

...conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol.

Madam Justice Ballance concluded that the Ministry had breached its obligations to Stanco Projects Ltd. by engaging in bid shopping. This analysis was upheld at the Court of Appeal.

### **C. THE CONSULTANT'S LIABILITY**

At trial, Madam Justice Ballance concluded that the consultant engaged by the Ministry to administer the tender process had acted negligently and had breached its contract with the Ministry because of the consultant's actions throughout the tender process. However, at trial, the consultant was absolved of liability because the trial judge held that the Ministry was an experienced party in tendering and had not relied on the consultant as alleged.

On appeal, the British Columbia Court of Appeal found that the consultant had contributed materially to the breach of the duty of fairness owed by the Ministry to Stanco. Further, although the Ministry's actions had been a contributing cause of the breach by the Ministry of its obligations to Stanco, these actions were but one contributing cause. Relying on a legal principle to the effect that the law does not excuse a defendant from liability merely because other causal factors for which it is not responsible also helped to produce the harm, the B.C. Court of Appeal concluded that the consultant was liable to the Ministry for damages suffered as a result of the breach by the Ministry of its obligations to Stanco.

The result in Stanco is supported by an earlier decision of the Ontario Superior Court of Justice, *Tectonic Infrastructure Inc. v. Middlesex Centre (Township)*. Like Stanco, the consultant engaged by the tendering authority in *Tectonic* was liable for its role in a flawed tender process. This decision was not brought to the Court's attention at either the trial or appellate levels in *Stanco* and, accordingly, the decision is not referred to at either the trial or appellate levels.

The finding on appeal in *Stanco*, and in *Tectonic*, with respect to the consultant's liability may serve as a reminder to all consultants, architects, and other construction professionals who are engaged by tendering authorities to assist with or to manage a tender process. These professionals may be exposed to liability if their negligence or a breach of a term of their professional services agreement causes the tendering authority to breach its bid contract with one or more tenderers.

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